



Kelly Scott Thomas (“Thomas”) was convicted in Elkhart Circuit Court of felony murder and sentenced to sixty-five years. He appeals and we find the following argument to be dispositive: whether Thomas’s conviction must be reversed because the jury was not instructed on the elements of robbery, the underlying felony that served as the basis for his felony murder conviction.<sup>1</sup> Concluding that the trial court committed fundamental error when it failed to instruct the jury on the elements of robbery, we reverse and remand for a new trial.

### **Facts and Procedural History**

During the evening of May 19, 2003, Stacy Orue (“Orue”), Kevin “Mississippi” Taylor (“Taylor”), and Thomas (collectively “the Defendants”) proceeded to the residence of Gwen Hunt (“Hunt”) to obtain crack cocaine. The Defendants then decided to rob Hunt, and during the course of the robbery, Hunt was shot in the head and died as a result of the gunshot wound.

On July 27, 2004, the Defendants were charged with felony murder. A five-day jury trial commenced on January 31, 2005. The Defendants were found guilty as charged. Thomas was sentenced to serve sixty-five years. Thomas appeals.<sup>2</sup> Additional facts will be provided as necessary.

### **Discussion and Decision**

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<sup>1</sup> Thomas also raised the following argument in his brief: whether the trial court abused its discretion when it denied his motion to sever his trial from that of his co-defendants and admitted statements of his co-defendants in violation of Bruton v. United States, 391 U.S. 123 (1968).

<sup>2</sup> We heard oral argument on November 17, 2005, at DeKalb High School in Waterloo, Indiana. We thank the faculty, staff, and students for their hospitality and counsel for their presentations.

As our supreme court has observed, “a person can be guilty of the crime of Murder in several ways.” Thomas v. State, 827 N.E.2d 1131, 1132 (Ind. 2005).

One such way is by knowingly or intentionally killing another human being. A second is by killing another human being while committing or attempting to commit certain felonies such as arson, burglary, or dealing in cocaine. The first of these two ways is often referred to as the crime of “Knowing or Intentional Murder,” and is established by Indiana Code § 35-42-1-1(1); the second as “Felony Murder,” established by Indiana Code § 35-42-1-1(3). The difference between what the State must prove to obtain a conviction for each of these two types of murder is that, for Knowing or Intentional Murder, the State must prove that the killing was committed “knowingly or intentionally”; for Felony Murder, the State need not prove that the defendant acted with any particular mental state--the killing could be totally accidental--so long as the State does prove that the killing occurred while the defendant was committing (or attempting to commit) a specified felony.

Id. at 1132-33.

Here, Thomas was charged with and convicted of felony murder. Specifically, the charging information alleged that Thomas “did kill another human being, to wit: one Gwendolyn Hunt, while knowingly committing the crime of robbery[.]” Appellant’s App. p. 1.

Thomas argues, “the jury verdict was [] faulty in that the jury could not have concluded that Thomas knowingly participated in a ‘robbery’ without having been instructed on the elements of robbery.”<sup>3</sup> Amended Br. of Appellant at 18. Thomas therefore contends that his felony murder conviction cannot be sustained because the jury was not “advised of all of the elements of the underlying felony.” Id. at 19.

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<sup>3</sup> Thomas failed to raise this issue in his Appellant’s Brief, however, he requested and received permission to file an amended Appellant’s Brief on December 8, 2005, for the purpose of presenting this argument to our court. The State chose not to respond to Thomas’s additional argument.

At trial, Thomas failed to submit a robbery instruction or object to the lack of a robbery instruction; therefore, he invokes the “fundamental error” doctrine. “[I]t is well settled that fundamental error is ‘error so egregious that reversal of a criminal conviction is required even if no objection to the error is registered at trial.’” Gamble v. State, 831 N.E.2d 178, 185 (Ind. Ct. App. 2005), trans. denied (quoting Hopkins v. State, 782 N.E.2d 988, 991 (Ind. 2003)). See also Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002) (“The ‘fundamental error’ rule is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.”).

In support of this argument, Thomas relies on our supreme court’s recent decision in Thomas. In that case, the charging information and jury instructions contained the elements of both felony murder and knowing or intentional murder. 827 N.E.2d at 1133-34. On appeal of the denial of his petition for post-conviction relief, the defendant argued his counsel was ineffective for failing to challenge the jury instructions that did not set forth the elements of the crime of dealing in cocaine, the underlying felony that served as the basis for felony murder. Id. at 1134.

The supreme court determined that counsel was not ineffective because the jury was instructed on the elements of knowing or intentional murder and the State met its burden of proof on each and every element of that offense. Id. However, the court also stated:

It is important to note that part of the reason why there is no harm here from the failure to instruct on the specific elements of dealing in cocaine is that, even though the charging instrument may have referred to the offense as

Felony Murder, Thomas was in fact charged with all of the elements of Knowing and Intentional Murder and each of those elements was contained in the jury charge as well. It would have been a different case entirely if Thomas had been charged with only the elements of Felony Murder; in that circumstance, it would have been necessary to provide the jury with the specific elements of the underlying felony.

Id. at 1134-35. See also Brownlow v. State, 484 N.E.2d 560, 562 (Ind. 1985) (Where the defendant was charged with felony murder stemming from the perpetration of a robbery, “it was necessary to instruct the jury on the definition of robbery, in that it was necessary for the jury to find that a robbery in fact had been perpetrated before it could come to the conclusion that a felony murder had been committed.”); Lacy v. State, 438 N.E.2d 968, 971 (Ind. 1982) (It is fundamental error for the trial court to fail to give an instruction setting forth all the elements of the offense.).

“[I]t is bedrock law that a defendant in a criminal case is entitled to have the jury instructed on all of the elements of the charged offense[.]” Thomas, 827 N.E.2d at 1134 (citing In re Winship, 397 U.S. 358, 373-74 (1970)). Thomas was only charged with and convicted of felony murder. Accordingly, we conclude that the trial court’s failure to instruct the jury on the elements of the underlying offense of robbery resulted in a denial of fundamental due process to Thomas. Thomas is therefore entitled to a new trial.

Reversed and remanded for a new trial.

BARNES, J., and CRONE, J., concur.